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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

PAUL RAY VIRGA,

Defendant and Appellant.

G047261

(Consol. with G047262)

(Super. Ct. Nos. 08SF0675,
10SF0308)

O P I N I O N

Appeals from an order of the Superior Court of Orange County, Edward Hall, Temporary Judge. (Pursuant to Cal. Const., art VI, § 21.) Order reversed with directions.

Jennifer Hansen, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, William M. Wood and Ifeolu E. Hassan, Deputy Attorney Generals, for Plaintiff and Respondent.

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THE COURT:*

Defendant Paul Ray Virga appeals the trial court's order requiring him to pay probation costs of \$3,264.90 resulting from his two no contest pleas at a rate of \$100 per month. He argues, and the Attorney General agrees, that the court's finding he had the ability to pay these amounts was not supported by substantial evidence. We too are in agreement.

Because the court's order was based on virtually nonexistent evidence of Virga's ability to pay his probation costs, we direct that the order imposing probation costs be reversed.

I

Facts and Proceedings

In Orange County Superior Court case No. 08SF0675, Virga was charged with possessing methamphetamine, as well as misdemeanor possession of drug paraphernalia. He pled guilty to both counts in October 2008. As part of a negotiated disposition, entry of judgment was deferred and he enrolled in a drug program pursuant to Penal Code section 1000. He completed the program.

In the interim, Virga accrued another case. In Orange County Superior Court case No. 10SF0308 filed against him in April 2010, he was charged with possessing methamphetamine, misdemeanor forgery of vehicle registration forms and misdemeanor driving on a suspended violation. In July 2010 he pled guilty to possessing methamphetamine, and took part in Proposition 36 drug treatment pursuant to Penal Code section 1210. All other counts against him were dismissed. Virga completed the required drug program. On June 25, 2012, Virga's two cases were dismissed pursuant to Penal Code section 1210.

* Before Rylaarsdam, Acting P.J., Fybel, J., and Ikola, J.

The Ability to Pay Hearing Held on June 25, 2012

On June 25, 2012, the court held a hearing on the cost of probation and Virga's ability to pay that encompassed his financial liability on both of his cases. The district attorney did not appear at this hearing.

According to the probation officer present at the hearing, Virga owed a total of \$3,264.90 for probation costs in both cases. At the time of the hearing he had not made a payment toward his balance in the past three months, and had only paid a total of \$100 towards the full amount owed. Trial counsel urged the court to vacate the monthly probation assessment in its entirety, or in the alternative, to reduce the total amount to \$25 to \$30 per month.

At the time of the hearing, Virga was 56 years old. He was living in Big Bear and was suffering from two types of cancer. He did not own a car. He was working intermittently as a cook in a restaurant for \$9.25 per hour; he had an interview scheduled for a permanent position at a retail establishment for 24 to 30 hours per week at a rate of \$8 per hour. Virga's monthly expenses totaled \$800. He paid \$650 for rent; [his lease agreement indicated utilities were to be covered by the landlord]; \$25 for ticket fees; and \$125 credit card payments on a \$5,000 past due account. His food costs were covered by food stamps at the time but would be terminated if he found permanent employment. His checking account had a balance of \$114.05.

At the conclusion of the hearing the court modified Virga's payments from \$137 per month to \$100 per month.

II

Discussion

Penal Code section 1203.1b, subdivision (b)(2), requires a court to order reimbursement if it determines a defendant has the ability to pay all or part of the costs of

probation. Section 1203.1b, subdivision (e) provides: “The term ‘ability to pay’ means the overall capability of the defendant to reimburse the costs, or a portion of the costs, of conducting the presentence investigation, preparing the pre-plea or presentence report, . . . and shall include, but shall not be limited to, the defendant’s: [¶] (1) Present financial position. [¶] (2) Reasonably discernible future financial position. In no event shall the court consider a period of more than one year from the date of the hearing for purposes of determining reasonably discernible future financial position. [¶] (3) Likelihood that the defendant shall be able to obtain employment within the one-year period from the date of the hearing. [¶] (4) Any other factor or factors that may bear upon the defendant’s financial capability to reimburse the county for the costs.”

An order finding a defendant has the ability to pay must be supported by substantial evidence. (*People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1398, disapproved on separate grounds in *People v. McCullough* (2013) 56 Cal.4th 589.) Substantial evidence is evidence that is of solid, probative value. (*People v. Conner* (1983) 34 Cal.3d 141, 149.) There was no such evidence here.

We conclude the evidence presented at Virga’s ability to pay hearing established not only that his present ability to pay his living expenses was virtually nonexistent, but that his scant employment opportunities would do little to change his financial situation in the future. In sum, there was not substantial evidence to establish his ability to pay any part of his probation costs.

III

Disposition

The court’s order of June 25, 2012, directing Virga to pay probation costs of \$3,264.90 in case Nos. 08SF0675 and 10SF0308 at \$100 per month pursuant to Penal Code section 1203.1b is hereby reversed. The trial court is directed to enter a new order that Virga shall not be required to pay any part of his probation costs.